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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ACTION ON SMOKING AND HEALTH (ASH)

RECEIVED

Petitioner

vs.

THE UNITED STATES DEPARTMENT OF LABOR; THE HONORABLE ROBERT C. REICH, Secretary of Labor; THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION (OSHA); AND THE HONORABLE JOSEPH A. DEAR, the Assistant Secretary of Labor for Occupational Safety and Health

Respondents

PETITION FOR REVIEW

No. 95-1616

PETITION:

(A) FOR REVIEW UNDER 29 USC §655(f) OF OSHA'S DELIBERATE DETERMINATION NOT TO DECIDE WHETHER TO ISSUE A STANDARD REGULATING ENVIRONMENTAL TOBACCO SMOKE (ETS) AS A POTENTIAL OCCUPATIONAL CARCINOGEN WITHIN THE TIME PERIOD PROVIDED BY ITS OWN CANCER POLICY REGULATIONS WHICH THIS COURT HAS TWICE RECOGNIZED AS CONTROLLING THE PROCEEDINGS, BUT INSTEAD TO TWICE EXTEND THE DEADLINE FOR ADDITIONAL COMMENTS BEYOND THE CANCER POLICY DEADLINES.

(B) FOR REVIEW UNDER 29 USC §655(f) OF OSHA'S DETERMINATION TO DELIBERATELY VIOLATE ITS OWN CANCER POLICY TIME PERIOD DEADLINES BY NOT DECIDING WHETHER TO ISSUE A STANDARD REGULATING ENVIRONMENTAL TOBACCO SMOKE (ETS) AS A POTENTIAL OCCUPATIONAL CARCINOGEN BY NOVEMBER 11, 1995, AND BY INSTEAD EXTENDING THE TIME PERIOD FOR COMMENTS BEYOND THAT PROVIDED BY THE CANCER POLICY
WHICH THIS COURT HAS RECOGNIZED CONTROLS;

(C) FOR REVIEW UNDER 29 USC §655(f) OF OSHA'S DETERMINATION TO DELIBERATELY VIOLATE ITS OWN CANCER POLICY BY NOT CONSIDERING THE REGULATION OF A CARCINOGENIC SUBSTANCE IN A SEPARATE PROCEEDING, AND FOR ADMITTING INTO THE RULEMAKING RECORD VAST AMOUNTS OF EXTRANEOUS MATERIALS SPECIFICALLY PRECLUDED FROM ADMISSION UNDER ITS OWN CANCER POLICY,
WITH RESULTING DELAY BOTH NOW AND IN THE FUTURE;

(D) TO COMPEL AGENCY ACTION UNLAWFULLY WITHHELD OR UNREASONABLY DELAYED, INCLUDING COMPLIANCE BY OSHA WITH THE SPECIFIC TIMETABLE FOR RULEMAKING ON ETS REQUIRED BY THE AGENCY'S OWN REGULATIONS AND RECOGNIZED AS CONTROLLING BY THIS COURT.

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I. Petitioner, Action on Smoking and Health (ASH), which carries on its nonprofit charitable activities at 2013 H Street, N.W., Washington, D.C. 20006, hereby petitions the Court to review OSHA's deliberate determination not to decide whether to issue a standard regulating environmental tobacco smoke as a potential occupational carcinogen within the time period provided by its own cancer policy regulations, 29 C.F.R. 1990.101 et seq., which this Court has twice recognized is controlling in this case. Petitioner also seeks an order compelling the agency to act without further delay, preferably in the form of a court-ordered deadline.

II. Petitioner also seeks review of OSHA's determination to deliberately violate its own cancer policy time period deadlines by not deciding whether to issue a standard regulating environmental tobacco smoke (ETS) as a potential occupational carcinogen by November 11, 1995, and by instead extending the time period for comments beyond that provided by the cancer policy which this Court has recognized controls.[1] A copy of this order by the Acting Chief Administrative Law Judge of the Occupational Safety and Health Administration (OSHA) is attached and marked Exhibit 1.

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[1] In its order dated July 12, 1994, this Court held that "Although we recognize that a conflict does exist between [OSHA's notice of proposed rulemaking] and the Cancer Policy insofar as the designated comment period is concerned, ASH failed to raise this claim in its petition for review and we therefore decline to address it." For this reason, this issue is expressly addressed now.

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III. Petitioners also seek review of the agency's decision, in direct violation of its cancer policy, not to consider the regulation of a potential occupational carcinogen (ETS) in a separate proceeding, and instead to consider it in a proceeding along with the potential regulation of hundreds if not thousands of known and potentially unknown non-carcinogenic airborne contaminants, with resulting delay both now and in the future.[2]

IV. Petitioners also seek review of the agency's decision, in direct violation of its cancer policy, to permit even into the portion of the rulemaking proceeding related to environmental tobacco smoke (ETS) vast amounts of extraneous materials specifically precluded from admission under its own cancer policy, with resulting delay both now and in the future. For example, § 1990.146 sharply limits the issues which will be considered in any rulemaking related to an occupational carcinogen, and § 1990.144 and § 1990.145 limits the type of scientific evidence which will be regarded as relevant.[3]

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[2] In its order dated July 12, 1994, this Court held that "the comments that the agency receives during the notice and comment period may persuade the agency that it should regulate ETS in a separate proceeding. . . . Because no legal consequences presently attach to OSHA's inclusion of ETS in the proposed omnibus rulemaking, it is premature for us to consider petitioner's challenge to the omnibus nature of OSHA's proposed rulemaking. Petitioner may renew its challenge if and when OSHA's rulemaking generates concrete, legal ramifications for petitioner", as it now has.

[3] Notwithstanding this, a recent article noted that, "According to an official at OSHA's office on health standards, the vast majority of the more than 100,000 comments received by the agency were letters from smokers solicited by Philip Morris U.S.A and R.J. Reynolds_both of whom rallied their troops to write letters to OSHA." Letter

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V. ASH also seeks an order that the determination not to issue a standard regulating environmental tobacco smoke (ETS) as a potential occupational carcinogen in a timely manner, as required by the OSHA Cancer Policy, 29 C.F.R. 1990.101 et seq., should be set aside pursuant to 5 U.S.C. §706 as arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.

VI. This petition is filed pursuant to this Court's earlier rulings on ASH Petitions for Review involving OSHA (see attachments). In its order dated July 12, 1994, a copy of which is attached as Exhibit 2, this Court held that "petitioner's allegation that OSHA unreasonably delayed issuing health and safety standards for ETS qualifies for [the TRAC exception giving the Court jurisdiction]."

However, the Court held that petitioner's "claim that the proposed omnibus rulemaking will violate the Cancer Policy's regulatory timetable and will unreasonably delay regulation of ETS" was at that time "unripe for judicial review" because a final decision could still be reached within the time specified in the Cancer Policy. It also noted that "although a conflict might arise between OSHA's proposed IAQ [Indoor Air Quality] rulemaking and the Cancer Policy's regulatory timetable, we cannot now reasonably anticipate that it will. Nevertheless the Court ruled that

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writers were reportedly told by the tobacco industry that "OSHA wants to impose a no-smoking rule in virtually all indoor places where anyone works perhaps even reaching into your own home." Wittes, "OSHA's Bold Plan: Up In Smoke?," Legal Times, 11/20/1995.

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"Petitioner may renew its challenge if and when OSHA's rulemaking generates concrete, legal ramifications for petitioner", as it now has in this case.

VII. This petition is also consistent with the Court's subsequent order dated November 22, 1994 (copy attached as Exhibit 3). In that order the Court stated that: Action on Smoking and Health's claim of future unreasonable delay was "not ripe for judicial review." "Because OSHA could still issue its final rule within 120 days from the conclusion of the hearing, we cannot say that OSHA's rulemaking will, in all likelihood extend beyond the schedule set forth in the Cancer Policy. Furthermore, OSHA could determine that it is unable to issue a final rule within that period and, consistent with the Cancer Policy, take an additional 120 days to issue its final rule. In addition, because no legal consequences attach to OSHA's inclusion of environmental tobacco smoke in the proposed omnibus rulemaking, it is premature for us to consider ASH's challenge to the nature of OSHA's proposed rulemaking." Since the very delay and violation the Court hypothesized has in fact occurred, the challenge is now "ripe."

VII. This petition is filed pursuant to 29 U.S.C. §655(f), which allows any person adversely affected by a standard or (by necessary implication) by OSHA's failure to issue a standard, or to comply with its own time requirements, to challenge the validity of such action by filing a petition with the United States Court of Appeals

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for the circuit wherein such person resides or has a principal place of business, seeking judicial review of such standard.

VIII. ASH, in relation to its request for review under 29 U.S.C. §655(f), is adversely affected by OSHA's determination in, inter alia, the following ways:

A. ASH, as a nonprofit charitable trust charged with safeguarding nonsmokers' rights and protecting nonsmokers' health, has been denied the benefit of a regulation pursuant to OSHA's Cancer Policy which would protect the safety and health of its working members and other employees throughout the United States by prohibiting environmental tobacco smoke, a known carcinogen, in the workplace.

B. In refusing to issue a standard regulating ETS as a potential occupational carcinogen, or to comply with its own time requirements for a rulemaking on ETS, OSHA has ensured that ASH members and other employees will be exposed unnecessarily to environmental tobacco smoke and to the toxic and carcinogenic elements and compounds it is composed of, as a result, numerous employees will become ill and die because of such exposure; in making such a determination OSHA has adversely affected ASH and its employed members by disregarding the substantial evidence that ETS is a potential occupational carcinogen requiring regulation under the criteria set forth in OSHA's Cancer Policy. The feasibility of

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such regulation is shown by the five states which have already successfully regulated smoking in the workplace -- California, Utah, Vermont, Maryland, and Washington State.

C. ASH and its members are also adversely affected by OSHA's determination in that they and other employees will continue to be exposed to environmental tobacco smoke, a recognized health hazard with known carcinogenic effects, because OSHA disregarded the declared purposes of 29 U.S.C. §651(b) to assure so far as possible every working man and woman in the Nation safe and healthful working conditions, the requirement of 29 U.S.C. §654 which requires every employer engaged in business affecting commerce to furnish each employee a place of employment which is free from recognized hazards that are causing or are likely to cause death or serious physical harm, and the stated purpose of OSHA's Cancer Policy set forth at 29 C.F.C. 1990.102, namely to carry out the intent of the Occupational Safety and Health Act of 1970 with regard to potential occupational carcinogens.

D. ASH and its members were furthermore adversely affected by OSHA's determination because such determination was not based on whether ETS meets the criteria for regulation consistent with OSHA's Cancer Policy or, whether there was substantial scientific evidence in the record considered as a whole for regulation of environmental tobacco smoke as a potential occupational carcinogen, but rather on ancillary considerations. Such ancillary

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considerations cannot be used under the Cancer Policy, and cannot be a valid excuse for further agency delay.

E. ASH has also been harmed because OSHA has not complied with its representation to this Court in Cases Nos. 94-1551, 92-1661, 91-1037 and 91-1038 that it would make a determination whether and how to regulate ETS in the workplace as soon as possible and in compliance with its procedural time deadlines. That failure to comply has affected and continues to adversely affect ASH who was the petitioner in those cases and who was granted leave by this Court to renew its request if OSHA continued to unreasonably delay resolution of this matter.[4]

IX. ASH seeks review of OSHA's determination not to issue a standard regulating environmental tobacco smoke as a potential occupational carcinogen within the time period provided in its own cancer policy regulations, on the grounds, inter alia, that:

A. OSHA's refusal to make a timely determination on whether to regulate environmental tobacco smoke as a potential occupational carcinogen should be held unlawful and set aside as agency action

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[4] The magnitude of the problem is suggested by a recent article entitled "OSHA's Bold Plan: Up In Smoke?" in the Legal Times of 11/20/1995. It says:

> When OSHA introduced its workplace smoking ban 20 months ago, agency officials were expecting to issue a final rule by the end of this year. . . . Officially, the rule-making process is moving forward, with final comments on the proposal due in January. But while the agency could issue a final regulation after that, nobody expects OSHA to move quickly. Even agency officials concede that a final rule is a long way off. "A lot has to happen between now and then," says OSHA's Finkel. . . . Most experts following the issue say it is doubtful that the agency will issue the final rule before the 1996 presidential election.

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which is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law because it is in deliberate violation of the time periods mandated for regulation of workplace carcinogens set forth in OSHA's Cancer Policy, 29 C.F.R. § 1990.101 et seq. and, most specifically, 29 C.F.R. §1990.147(a), which requires that the Secretary issue his final decision within 120 days from the last day of any hearing. In this case that date was on or about July 11, 1995, a date which has long since passed.

B. Although the Secretary can obtain a 120-day extension by following the procedures specified in §1990.147(a)(3)(ii), the Secretary has not done this, and even if he had, this extended time period would require a final decision on or about November 11, 1995, an action which has not been taken as of this date in December.

C. The failure of OSHA to make a timely determination on ETS should also be found to constitute unreasonable delay because:

1. The grave dangers of ETS have been known since at least 1986 when the National Academy of Sciences and the U.S. Public Health Service both published comprehensive reports on ETS, which concluded that involuntary smoking causes lung cancer and lung cancer deaths in nonsmokers; and

2. For more than 18 years ASH has raised the issue of the danger of ETS in the workplace with OSHA through formal petitions for rulemaking.

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X. A. From the foregoing considerations it appears that OSHA's determinations are not supported by substantial evidence in the record considered as a whole.

B. OSHA's determinations, in the above-mentioned circumstances, also fail to comply with the standard of freedom from arbitrariness or irrationality which determinations by OSHA must satisfy in relation to such quasi-legislative decisions.

C. ASH's Petition for Review of OSHA's determinations is grounded also in 5 U.S.C. §706, in that the circumstances, described supra, demonstrate that OSHA's determinations constitute action that was unlawfully withheld or unreasonably delayed and should be set aside as arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law.

XI. Additional and further grounds for review will be set forth in the Brief to be submitted by ASH to this Court.

WHEREFORE, Petitioner Action on Smoking and Health requests that the Court:

1. Review and set aside the determination of the Occupational Safety and Health Administration refusing to issue a timely standard regulating environmental tobacco smoke as a potential occupational carcinogen;

2. Remand the matter to OSHA for compliance with ASH's Petition for regulation of environmental tobacco smoke in the workplace, as a potential occupational carcinogen, under the criteria, procedures and time limits contained in OSHA's Cancer Policy, or as soon thereafter as possible;

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3. Grant such further relief as the Court deems just and equitable, including attorney's fees and costs.

Respectfully submitted,

ACTION ON SMOKING AND HEALTH (ASH)

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Dated December 22, 1995

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CERTIFICATE OF SERVICE

We hereby certify that copies of the attached Petition for Review, were today, December 22, 1995, served by prepaid certified mail, return receipt requested, upon the persons whose names and addresses are listed below:

+ with copies of Exhibits

(1) United States Department of Labor
Frances Perkins Building, Room S2018
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Washington, DC 20210

(2) The Honorable Robert C. Reich
Secretary of Labor
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Washington, DC 20210

(3) Occupational Safety and Health Administration (OSHA)
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(4) The Honorable Joseph A. Dear
Assistant Secretary for
Occupational Safety and Health
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Washington, DC 20210

(5) The Honorable Janet Reno
Attorney General of the United States
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Washington, DC 20530

(6) The Honorable Eric H. Holder, Jr.
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(7) Charles F. James, Esquire
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